

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

TIMOTHY K. LYKINS)	
Claimant)	
VS.)	
)	Docket Nos. 172,085 & 208,988
MIDWEST GRAIN PRODUCTS, INC.)	
Respondent,)	
Self-Insured)	
AND)	
)	
WORKERS COMPENSATION FUND)	

ORDER

Claimant appealed the April 4, 2001 Award and the April 18, 2001 Order Nunc Pro Tunc that were entered by Administrative Law Judge Bryce D. Benedict.

APPEARANCES

John J. Bryan of Topeka, Kansas, appeared for claimant. John B. Rathmel of Prairie Village, Kansas, appeared for respondent. Jerry R. Shelor of Topeka, Kansas, appeared for the Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Claimant was injured at work on January 15, 1990, when several heavy bags of flour fell on his neck and back. That accident is the subject of Docket #172,085. Claimant was again injured at work on March 25, 1993, when he tripped while pulling a wheelbarrow and fell backwards, landing on his buttocks. That accident is the subject of Docket #208,988.

In the April 4, 2001 Award, Judge Benedict found claimant had sustained a five percent whole body functional impairment as a result of the January 1990 accident and an additional five percent whole body functional impairment as a result of the March 1993

accident. The Judge then awarded claimant a five percent permanent partial general disability for each accident. For the second accident, the Judge assessed liability against the Workers Compensation Fund (Fund).

Claimant contends Judge Benedict erred. Claimant argues there is uncontradicted evidence that claimant sustained a seven percent whole body functional impairment in the first accident. Accordingly, claimant requests the Board to grant claimant a seven percent permanent partial general disability for the January 1990 accident and either a six and one-half percent or eight percent permanent partial general disability for the March 1993 accident.

In both claims, the parties stipulated that claimant sustained personal injury by accident arising out of and in the course of employment with respondent. The only issue before the Board on this appeal is the extent of functional impairment that claimant sustained in each accident.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. The Award and Order Nunc Pro Tunc should be modified to grant claimant benefits for a seven percent whole body functional impairment for the January 1990 accident and a 15 percent whole body functional impairment for the March 1993 accident. Additionally, the compensation payable for the March 1993 accident should be reduced pursuant to the credit for prior compensable injuries as set forth in K.S.A. 44-510a (Ensley).
2. Claimant began working for respondent in 1987. On January 15, 1990, claimant injured his lower back when three or four bags of flour, each weighing approximately 110 pounds, toppled over and fell on claimant. As a result of that accident, claimant experienced mid and low back pain, along with shooting pain and numbness into his left leg. Claimant received treatment for that injury, including two MRI scans, which revealed either herniated or bulging disks at L4-5 and L5-S1.
3. At the time of the January 1990 accident, claimant was classified as a laborer. Following that accident, claimant received medical treatment while continuing to work for respondent. Claimant eventually bid into a miller's assistant position, which was claimant's job title at the time of the March 25, 1993 accident. On that date, claimant sustained additional injury when he was backing up while pulling a wheelbarrow of flour and tripped, falling backwards and landing on his buttocks.
4. Following the March 1993 accident, claimant sought medical treatment and, according to the medical reports introduced into evidence, began treating with Dr. Maeda in June 1993. Dr. Maeda prescribed a series of three lumbar epidurals. The doctor also requested an MRI scan. Dr. Maeda released claimant from care in late August 1993.

5. The parties stipulated that Dr. Michael J. Poppa's June 7, 1994 medical report would be part of the evidentiary record. Dr. Poppa, who is board-certified in occupational medicine, examined claimant at respondent's request in June 1994. Dr. Poppa diagnosed a lumbar strain and rated claimant as having a five percent whole body functional impairment. In his June 7, 1994 report, the doctor stated:

It is concluded Mr. Timothy Lykins [claimant] presents a history of a previous work related injury which occurred around 1989 or '90 while employed by Midwest Grain [respondent] with resultant bulging disk at L4-5 and L5-S1. At that time he underwent treatment consisting of a work hardening program and medications.

He also presents a history of a recent work related injury while employed by Midwest Grain dated 3/25/93 with aggravation of his pre-existing condition consisting of a lumbar strain. He underwent an MR scan which revealed essentially no change in the bulging disk of his lower back and no evidence of herniation or nerve root encroachment. He received conservative treatment consisting of medications and physical therapy. He returned to regular duties as an assistant miller at Midwest Grain, however, at the time of his release from medical care, his physician placed him on lifting restrictions.

Based upon the present examination and review of provided medical records, it is my opinion that Mr. Timothy Lykins reached maximum medical improvement at the time of his release from the care of Dr. Maeda. **As a result of his lumbar strain with aggravation of his pre-existing condition, Mr. Lykins has a 5% impairment of the whole person.** This is in accordance with the Guides to the Evaluation of Permanent Impairment, 3rd Edition - revised, page 80, table 53, section 2-B. **However, but for the presence of his pre-existing impairment, Mr. Lykins probably or most likely would not have sustained his present physical impairment.** It is my opinion he requires no work restrictions at this time. He requires no additional treatment and I anticipate no complications. He is not a surgical candidate. (Emphasis added.)

Contrary to claimant's contentions, the Board does not interpret Dr. Poppa's report to indicate that claimant sustained an additional five percent whole body functional impairment as a result of the March 1993 accident. Instead, the Board finds that the doctor's report indicates that at the time of the June 1994 evaluation claimant's total functional impairment was five percent, which included the impairment from the January 1990 accident with the impairment from the March 1993 accident.

6. Claimant presented the deposition of Dr. Daniel D. Zimmerman, who is a district medical director for the Department of Labor and who evaluated claimant in March 1998. According to Dr. Zimmerman, claimant had an MRI in August 1990 and a follow-up MRI in September 1992. Dr. Zimmerman believed that both of those MRI scans showed a central disk herniation at L4-5 and mild disk bulging at L5-S1. But the latter scan, however, indicated the herniated disk was somewhat more substantial because it showed secondary indentation of the thecal sac. According to Dr. Zimmerman, claimant sustained a seven percent whole body functional impairment as a result of the January 1990 accident.

7. Dr. Zimmerman also provided claimant an impairment rating for the two accidents combined. According to the doctor, following the second accident claimant had a 15 percent whole body functional impairment rating, or an additional eight percent. In his March 31, 1998 report, the doctor writes, in part:

I would state, secondary to the residuals of the lumbosacral spine injury, initially on January 15, 1990 and permanently aggravated by the injury occurring on March 25, 1993, that Mr. Lykins has sustained permanent partial impairment of the body as a whole which should be rated at 15%.

I would state that 7% of this body as a whole rating is attributable to the injury sustained on January 15, 1990, and 8% of this impairment rating is attributable to the permanent aggravation of the lumbosacral spine pathology due to the March 25, 1993 injury.

8. Dr. Zimmerman also testified that but for the physical impairment claimant sustained from the first accident, the second accident or the resulting impairment would not have occurred. Therefore, Dr. Zimmerman and Dr. Poppa agree as to the direct relationship between the two accidents.

9. After considering and weighing the expert medical opinions in the record, the Board finds that claimant sustained a seven percent whole body functional impairment as a result of the January 1990 accident. Dr. Poppa did not address claimant's functional impairment following the January 1990 accident, leaving Dr. Zimmerman's opinion as the only expert medical opinion in the record to address that issue.

Further, the Board finds that as a result of the March 1993 accident claimant's whole body functional impairment had increased to 15 percent.

10. Claimant is entitled to receive benefits for a seven percent permanent partial general disability for the January 1990 accident.

Claimant does not request a work disability (a permanent partial general disability greater than the functional impairment rating) for either accident. The formula for

permanent partial general disability for a January 1990 accident provides that it shall not be less than the functional impairment. The Workers Compensation Act reads, in part:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment.¹

As indicated in the findings above, claimant sustained a seven percent whole body functional impairment as a result of the January 1990 accident. Therefore, claimant is entitled to receive disability benefits based upon that functional impairment rating.

11. Claimant is entitled to receive a 15 percent permanent partial general disability for the March 1993 accident, subject to the reduction in compensation because of the January 1990 compensable injury.²

Claimant's disability benefits for the March 1993 accident are based on his 15 percent whole body functional impairment rating. But the disability benefits for that accident are reduced pursuant to the credit set forth in K.S.A 44-510a (Ensley), which provides:

(a) If an employee has received compensation or if compensation is collectible under the laws of this state or any other state or under any federal law which provides compensation for personal injury by accident arising out of and in the course of employment as provided in the workmen's compensation act, and suffers a later injury, compensation payable for any permanent total or partial disability for such later injury shall be reduced, as provided in subsection (b) of this section, by the percentage of contribution that the prior disability contributes to the overall disability following the later injury. The reduction shall be made only if the resulting permanent total or partial disability was contributed to by a prior disability and if compensation was actually paid or is collectible for such prior disability. Any reduction shall be limited to those weeks for which compensation was paid or is collectible for such prior disability and which are subsequent to the date of the later injury. The reduction shall terminate on the date the compensation for the

¹ K.S.A. 1989 Supp. 44-510e.

² See *Baxter v. L. T. Walls Constr. Co.*, 241 Kan. 588, 738 P.2d 445 (1987); *Poehlman v. Leydig*, 194 Kan. 649, 400 P.2d 724 (1965).

prior disability terminates . . . Such reduction shall not apply to temporary total disability, nor shall it apply to compensation for medical treatment.

(b) The percentage of contribution that the prior disability contributes to the later disability shall be applied to the money rate actually collected or collectible for the prior injury and the amount so determined shall be deducted from the money rate awarded for the later injury. This reduced amount of compensation shall be the total amount payable during the period of time provided in subsection (a), unless the disability award is increased under the provisions of K.S.A. 44-528 and amendments thereto.

12. The Board finds and concludes that the functional impairment from the January 1990 accident was included in determining claimant's functional impairment for the March 1993 accident. Therefore, the Board concludes the prior impairment and disability contributes 100 percent to claimant's ultimate impairment and disability. Consequently, the weekly disability compensation payable for the March 1993 accident should be reduced by the weekly compensation due for the January 1990 accident for each and every week that the permanent partial general disability benefits overlap.

13. The Board affirms the Judge's finding that the Fund is responsible for the benefits claimant is entitled to receive as a result of the March 1993 accident. The medical evidence is uncontradicted that the resulting impairment from the second accident would not have occurred but for the first accident. That evidence establishes Fund liability under the Act.³

AWARD

WHEREFORE, the Board modifies the April 4, 2001 Award and the April 18, 2001 Order Nunc Pro Tunc and awards claimant benefits for a seven percent permanent partial general disability for the January 15, 1990 accident and a 15 percent permanent partial general disability for the March 25, 1993 accident, subject to the K.S.A. 44-510a (Ensley) credit.

Docket #172,085

Timothy K. Lykins is granted compensation from Midwest Grain Products, Inc., for a January 15, 1990 accident and resulting disability. Based upon an average weekly wage of \$417.42, Mr. Lykins is entitled to receive 1.5 weeks of temporary total disability benefits at \$271 per week, or \$406.50, plus 413.5 weeks of permanent partial disability benefits at \$19.48 per week, or \$8,054.98, for a seven percent permanent partial general disability

³ See K.S.A. 1992 Supp. 44-567.

and a total award of \$8,461.48, which is all due and owing less any amounts previously paid.

Docket #208,988

Timothy K. Lykins is granted compensation from the Workers Compensation Fund for a March 25, 1993 accident and resulting disability. Based upon an average weekly wage of \$536.81, Mr. Lykins is entitled to receive the following disability benefits:

For the period from March 25, 1993, through December 30, 1997, which is the period that the permanent partial disability benefits overlap, 248.71 weeks of permanent partial disability benefits are due at \$34.20 (\$53.68 - \$19.48) per week, or \$8,505.88.

For the period commencing December 31, 1997, 166.29 weeks of permanent partial disability benefits are due at \$53.68 per week, or \$8,926.45, for a 15 percent permanent partial general disability and a total award of \$17,432.33, which is all due and owing less any amounts previously paid.

The Board adopts the orders set forth in the Award and the Order Nunc Pro Tunc that are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of August 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
John B. Rathmel, Prairie Village, KS
Jerry R. Shelor, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director